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No. 83-2069

In the Supreme Court of the United States

OCTOBER TERM, 1984

CALIFORNIA ASSOCIATION OF THE PHYSICALLY
HANDICAPPED, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT
IN OPPOSITION

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Petitioners challenge the decision of the court of appeals, declining to order the Federal Communications Commission to promulgate regulations applicable to broadcasters to include the handicapped as a group protected by the Commission's equal employment opportunity rules. Petitioners argue that the FCC's refusal to adopt such rules violated the "public interest" requirement of the Communications Act of 1934, 47 U.S.C. 307(a); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794; and the equal protection component of the Due Process Clause of the Fifth Amendment.

1. In September 1977, petitioner California Association of the Physically Handicapped (CAPH) filed a petition with the FCC requesting the Commission to promulgate regulations (1) to expand its equal employment opportunity

(EEO) rules to include handicapped individuals; (2) to give some preference to handicapped individuals in the ownership and management of broadcast facilities; and (3) to require the FCC's licensees to make their facilities accessible to handicapped individuals (Pet. App. 2). In response, the FCC requested public comments on the proposal (Pet. App. 13), and in light of those comments, the Commission issued a report and order declining to promulgate the proposed regulations (Pet. App. 11-41).

In rejecting the proposal, the Commission first considered whether it was required by federal law to adopt regulations concerning the handicapped. The Commission held that neither the "public interest" standard in the Communications Act nor Section 504 of the Rehabilitation Act, which prohibits discrimination against the handicapped in any program or activity that receives federal financial assistance, required the FCC to adopt rules to protect the handicapped (Pet. App. 22-30). Next, the Commission considered whether it should exercise its discretion under the public interest standard and include the handicapped within the coverage of its existing EEO regulations for women and minorities (*id.* at 30-32). The Commission concluded that it would be unwise to adopt a general rule on the subject because of the unique difficulties in defining and identifying the handicapped, as compared to other disadvantaged groups, and the practical problem of determining what accommodations should be made for them, which the FCC concluded could only be effectively accomplished on a case-by-case basis (Pet. App. 30-31).

Although the Commission rejected petitioner CAPH's specific proposal, the FCC noted that various commenters on the proposal suggested that it would be helpful if the Commission would attempt to provide licensees with more information concerning handicapped persons. Accordingly, the Commission appointed a coordinator for "broadcasting

and the handicapped" (Pet. App. 33). The coordinator was authorized to serve as an information clearinghouse for licensees with respect to the employment of the handicapped in broadcasting and on the methods by which licensees' facilities could be made to accommodate reasonably the handicapped (*ibid.*).¹

2. The court of appeals affirmed (Pet. App. 1-9). Relying upon this Court's decision in *Community Television of Southern California v. Gottfried*, 459 U.S. 498 (1983) the court of appeals held that Section 504 of the Rehabilitation Act "does not require the FCC to issue the regulations [petitioners] request[]" (Pet. App. 4). The court also relied upon *Gottfried* in holding that the "public interest" standard in the Communications Act provides no basis for requiring the FCC to adopt rules concerning the handicapped (Pet. App. 4-5). Finally, the court held that the disparate treatment the FCC has accorded the handicapped

¹Petitioners California Paralyzed Veterans Association (CPVA), Paula Zeller and Patty Ann Berkosky filed a petition for reconsideration of the FCC report and order. In addition to the statutory arguments that CAPH had presented, these petitioners also claimed that the Commission's action denied the handicapped equal protection guaranteed them by the Fifth Amendment. The FCC denied the petition on August 4, 1980; it explained that its justification for not treating the handicapped the same as minorities and women was reasonable, and therefore, the different treatment did not violate the Fifth Amendment (Pet. App. 46-47). The Commission's denial of the petition for reconsideration was appealed to the court of appeals and consolidated with CAPH's petition for review of the initial FCC order.

CAPH also filed suit in February 1979 in the United States District Court for the Central District of California against the FCC and various broadcast licensees. The district court dismissed the suit for lack of subject-matter jurisdiction after the Commission entered its order rejecting CAPH's petition (Pet. App. 49-51). CAPH appealed this decision to the court of appeals and the case was then consolidated with the two petitions seeking review of the FCC's initial order and order on reconsideration.

compared to women and minorities does not violate the handicapped's equal protection rights. The court reasoned that the classification should be judged under a rational relationship test, and that the Commission reasonably concluded that it would require a greater expenditure of agency resources to monitor rules concerning the handicapped than to monitor the rules concerning minorities and women (Pet. App. 5).²

3. Petitioners (Pet. 7-17) contend that the national policy favoring the elimination of invidious discrimination against the handicapped, expressed in Section 504 of the Rehabilitation Act, requires the FCC to promulgate regulations governing broadcast licensees' treatment of the handicapped. This Court in *Community Television of Southern California v. Gottfried*, *supra*, however, settled this issue, by holding that this statute does not impose any such enforcement obligation. With respect to Section 504 of the Rehabilitation Act, this Court declared that the Commission "is not a funding agency and has never been thought to have responsibility for enforcing § 504." 459 U.S. at 509. Since Congress did not expressly impose any new enforcement obligation on the Commission by adopting the Rehabilitation Act, it follows, *a fortiori*, that Congress did not impose such an obligation implicitly by incorporating Section 504's standards into the Communications Act through the "public interest" standard (see Pet. App. 4-5). Nor did the Commission abuse its wide discretion under the "public interest" standard by declining to adopt EEO regulations for the handicapped. See *Community Television of Southern California v. Gottfried*, 459 U.S. at 512. It fully

²The court of appeals also affirmed the district court's dismissal of CAPH's lawsuit and rejected petitioners' claim for attorneys' fees (Pet. App. 7-9). Petitioners do not present any question concerning these two issues in their petition.

explained that its decision was based on the difficulty the Commission would have in enforcing any rule designed to protect the handicapped as a class.³

4. Petitioners also assert that the Commission's failure to expand its EEO program to include handicapped persons violated their equal protection rights (Pet. 17-23). In support of this argument, petitioners claim (*id.* at 17-19) that the handicapped should be considered a suspect class and therefore the FCC's decision should be subjected to a standard of judicial review more intrusive than the rational relationship test used by the court of appeals. But as the court below pointed out, no court of appeals has ever held handicapped persons to be a suspect class (Pet. App. 5). See *Brown v. Sibley*, 650 F.2d 760, 766 (5th Cir. 1981).⁴ It is, in

³Petitioners assert (Pet. 23-26) in this Court for the first time that Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. 793, requires the FCC to promulgate regulations for the handicapped because FCC licenses can be viewed as federal contracts and hence the licensees are subject to that Section's affirmative action provision. This issue is not properly presented for decision by this Court. See *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, it is clear that federal broadcast licenses are not contracts, but merely temporary grants of privilege by the FCC. There is no exchange of goods or property within the meaning of the regulations governing federal contracts. 41 C.F.R. 60-741.2 (definition of government contract); see *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940).

⁴Petitioners suggest (Pet. 18-19) that, in the alternative, handicapped individuals constitute a semi-suspect class and their treatment should be subject to a standard of review greater than that used to judge economic regulations, but less exacting than that used to judge classifications based on race (Pet. 18-19). It is clear, however, that the handicapped as a class do not meet the criteria for any heightened scrutiny under the Constitution. Since the handicapped class is composed of many sub-groups, some of which have vastly different disabilities, it is, as a group, not subject to a single set of stereotyped characteristics; nor is there evidence that these individuals, again as a group, are the target of deep-seated prejudice of the kind to which other minorities are exposed. Cf. *Cleburne Living Center, Inc. v. City of Cleburne*, 726 F.2d 191,

any event, far from self-evident that suspect-classification analysis could somehow undermine a governmental determination *not* to differentiate between the handicapped and non-handicapped. The Commission's rules concerning minorities, for example, are valid *despite*, rather than because of, the fact that race is a suspect classification.

Accordingly, the court of appeals properly applied the rational basis test and correctly held that the FCC's explanation for its order satisfied that standard (Pet. App. 5). The reasons cited by the agency — the unique and multifaceted problems of handicapped persons and the limited resources and expertise of the Commission to set up an EEO program beyond one aimed at systemic discrimination — justified its refusal to expand the EEO rules to include the handicapped.

195-200 (5th Cir. 1984) (intermediate scrutiny warranted where class consists of one special disability — mentally retarded). In the absence of these factors, the rational relationship test was the appropriate standard for reviewing the FCC's decision. See *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982); *J. W. v. City of Tacoma*, 720 F.2d 1126, 1128-1129 (9th Cir. 1983).

If petitioners were correct that the FCC's refusal to accord the handicapped precisely the same protections as minorities and women is impermissible, then Congress's decision *not* to make Section 504's coverage coterminous with Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.*, which more comprehensively prohibits discrimination by employers against various groups, would seem to be equally suspect. The Commission relied heavily upon the difference in the statutes to justify refusing to include the handicapped within the protections of its EEO rule (Pet. App. 25).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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